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No. 04-631

AUG 1 5 2005

In The
Supreme Court of the United States

JOAN WAGNON, in her official capacity
as Secretary, Kansas Department of Revenue,

Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,

Respondent.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent advances three propositions in support of the court of appeals' decision: (1) the balance-of-interests standard in *White Mountain Apache v. Bracker*, 448 U.S. 136 (1980) applies because the "taxable event" is not the distributor's first receipt of fuel, but rather the subsequent delivery to Respondent's reservation (Respondent's Br. 11, 15) and that, in any event, the Kansas tax is "discriminatory" (Respondent's Br. 17); (2) no need exists to reconsider *White Mountain Apache* because courts – including this Court – have refined the analytical framework and applied it to specific factual situations without a problem (*Id.* 48-49); and, (3) in applying the balancing test, the court of appeals was correct in finding the balance in favor of Respondent because Respondent is not marketing a tax exemption (*Id.* 31) and the State provides no services on tribally owned roads (*Id.* 13). For the following reasons, these arguments are unpersuasive.

First, Respondent asks this Court to ignore the express language in Kan. Stat. Ann. § 79-3408(c) (Supp. 2003) specifying the *first receipt* of motor fuel by the distributor as the moment at which the fuel tax attaches. The limited exceptions to the tax liability – *e.g.*, motor fuel sold to the United States or its contractors, or motor fuel exported to other states – have no application here, and do not alter the point at which the distributor, manufacturer or importer incurs tax liability. Virtually every argument asserted by Respondent requires this Court to ignore the express language of the Kansas Motor Fuel Tax Act. *Second*, the suggestion that the *White Mountain Apache* balancing test has proved unproblematic in a taxation context cannot be squared either with the two Tenth Circuit decisions addressing fuel taxes (the opinion below and *Sac and Fox v. Pierce*, 213 F.3d 566 (10th Cir. 2000), *cert. denied*, 531 U.S. 1144 (2001)), or with the most recent Ninth Circuit decision concerning state authority to tax non-tribal entities doing business with tribes on reservation, *Yavapai-Prescott Indian Tribe v. Scott*, 117 F.3d 1107 (9th Cir. 1996). *White Mountain Apache* balancing simply

invites continued, highly amorphous litigation in an area that demands certainty. This case highlights the need for the Court to abandon balancing and instead adopt pre-emption based on congressional intent.

Last, Respondent's pretense that the State provides no services is plainly wrong. The record shows that the State provides substantial services on and off Respondent's reservation that benefit Respondent directly, and that are directly related to the taxes at issue here. (J. A. 79, 115, 118). Further, Respondent's claim that a state tax is permissible only when a tribal retailer "markets" an exemption from a state tax, and that invalidation of an off-reservation state tax is proper merely because customers are drawn to the station by Respondent's casino, ignores *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163 (1989) and *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134 (1980).

ARGUMENT

I. Because The Legal Incidence Of The Kansas Fuel Tax Is Imposed Off-Reservation, *White Mountain Apache* Balancing Does Not Apply

Respondent does not dispute Kansas' position that balancing under *White Mountain Apache* has no application when a State taxes or regulates off-reservation transactions or activity. Instead, Respondent simply denies that the tax here accrues off-reservation. There is no basis for such an assertion. The court below specifically held that the legal incidence of the tax at issue here is imposed on the distributor, a determination that comports with the text of the statutes. Further, the court below did *not* find that the taxable event is on the distributor's delivery of fuel to Respondent. *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 982 (10th Cir. 2004).

A. The plain language of the Kansas statutes impose the tax's legal incidence on the distributor's *first receipt* of fuel (here, off-reservation). Kan. Stat. Ann. § 79-3408(c) thus provides unequivocally that, "the incidence of this tax is imposed on the *distributor* of the first *receipt* of the motor

fuel." That such fuel may subsequently be marketed on or off-reservation is immaterial, since the legal obligation to pay the tax accrues upon receipt up stream and off-reservation. Respondent's re-characterization of the state tax as directed at on-reservation activity is palpably inaccurate. The Kansas statutes expressly identify who bears the fuel tax's legal incidence, and when that liability attaches.

Kan. Stat. Ann. § 79-3410(a) imposes the *payment* of tax liability upon the distributor:

> Every distributor, manufacturer or importer within the time herein fixed for the rendering of such reports, shall compute and shall pay to the director at the director's office the amount of taxes due to the state on all motor-vehicle fuels or special fuels *received* by such distributor, manufacturer or importer during the preceding calendar month. (Emphasis added.)

The term "retailer" is tellingly absent from § 79-3410(a). By leaving the retailer out of the payment provision, the legislature not only manifested its intent that the legal incidence of the fuel tax is on the distributor, importer or manufacturer but also that the attendant tax obligation accrues upon *receipt*. The term "received" admits of no construction that would allow a subsequent "event," such as delivery, to trigger the tax.[1]

Indeed, any other conclusion would run headlong into Kan. Stat. Ann. § 79-3409 which permits, but does not require, the distributor to "charge and collect an amount, including the cost of doing business that could include such tax on motor-vehicle fuels or special fuels sold or delivered by such distributor, as a part of the selling price." Respondent

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[1] Consequently, for immediate purposes, "first receipt" occurs when the involved distributor deposited fuel into "tank cars, tank trunks or other container" or into "any tank from which withdrawals are made direct into tank cars, tank trunks or other types of transportation equipment, containers or facilities." Kan. Stat. Ann. § 79-3401(p). That receipt necessarily takes place outside Respondent's reservation since the fuel must later be transported to the tribal retail outlet.

imputes to the Kansas legislature an intent to bestow upon distributors the discretion to determine when and where the "taxable event" occurs. Obviously enough, however, that event occurs when the distributor becomes liable for the tax and is not subject to modification by a subsequent decision to pass, or not pass, the tax through to the retailer as part of "the cost of *doing business*." (Emphasis added.) The distributor, in other words, acts as an entrepreneur, not as an involuntary state agent, in determining whether to transfer all or some of the economic burden of the tax down the distribution chain, and it therefore makes no sense to suggest that the legislature attached "taxable event"-shifting authority to an entirely private market-based choice.

The Kansas Motor Fuel Tax Act, Kan. Stat. Ann. § 79-3401, *et seq.*, is distinctly different from the Oklahoma act addressed in *Oklahoma Tax Commission v. Chickasaw Nation*, 515 U.S. 450 (1995). The Oklahoma statutes did not expressly identify who bears the tax's legal incidence. Here, Kansas statutes plainly identify who bears the legal incidence, and when the tax accrues. Nowhere do the Kansas statutes identify the remittance by distributors, manufacturers or importers as being *on behalf of a licensed retailer*, a feature of Oklahoma statute that the *Chickasaw Nation* Court deemed to be *crucial*. *See,* Okla. Stat., Tit. 68, § 505C. Nowhere do the Kansas statutes authorize a distributor, importer or manufacturer to deduct uncollected fuel taxes from future payments to Kansas. *Compare,* Okla. Stat., Tit. 68, § 505C. Nowhere do the Kansas statutes authorize distributors, importers or manufacturers to keep a portion of the fuel tax as a collection fee as Kansas' "agent." *Compare,* Okla. Stat., Tit. 68, § 506a. Finally, the Kansas "pass through" provision is discretionary, not mandatory. Kan. Stat. Ann. § 79-3409.

In addition to the court below, other lower federal courts in the Tenth Circuit have had no difficulty recognizing the

Kansas Legislature's determination that the incidence of the tax here is on a distributor's first receipt of fuel.[2]

"[T]he legal incidence of a tax falls on the party who the *legislature* intends will pay the tax." *United States v. California State Bd. of Equalization*, 650 F.3d 1127, 1130-31 (1981), *aff'd mem.*, 456 U.S. 901 (1982) (emphasis supplied). Consonant with this principle, an explicit legislative allocation of tax incidence to a particular economic entity, *e.g.*, the distributor, importer or manufacturer, is controlling. *See Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 482 (1976). It is only "[i]n the absence of such dispositive language" that a court is required to engage in statutory exegesis. *Chickasaw Nation*, 515 U.S. at 461. There is no need for the Court to doubt the Kansas Legislature's intent; it clearly placed the legal incidence of the Kansas tax on importers, distributors and manufacturers, when they receive the fuel. In this case, that receipt occurred off-reservation.

Having wrongly argued that the state tax statutes impose tax liability on reservation delivery (thus creating the fiction that the state is taxing on-reservation activity)

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[2] "Under the Kansas statutory scheme, the legal incidence of the state's fuel tax falls on the 'distributor of first *receipt*' of such fuel. Kan. Stat. Ann. § 79-3408(c). The distributor must compute and remit the tax each month for the fuel *received* by the distributor in the State of Kansas. KSA § 79-3410." *Winnebago Tribe of Nebraska v. Kline*, 297 F. Supp.2d 1291, 1294 (D. Kan. 2004). (Emphasis added.) "The structure of the fuel tax statute (Kan. Stat. Ann. § 79-3409) places the legal incidence of the tax on the fuel distributors, but permits the distributors to pass the tax directly to the fuel retailers." *Prairie Band Potawatomi Nation v. Richards*, 241 F. Supp.2d 1295, 1298, 1307-08 (D. Kan. 2003). "The legal incidence of the fuel tax falls on the 'distributor of first *receipt*' of such fuel." *Winnebago Tribe of Nebraska v. Stovall*, 216 F. Supp.2d 1226, 1228 (D. Kan. 2002). (Emphasis added.) "The court has found nothing in the Kansas tax laws, either prior to or after the 1998 amendments, which places the legal incidence of this tax on the retailer. Rather, the statutes are extremely clear in providing that the tax in question is imposed upon the distributor." *Sac and Fox Nation of Missouri v. Lafaver*, 31 F. Supp.2d 1298, 1304, 1307 (D. Kan. 1998). "We agree with the district court that the legal incidence of the tax law as presently written falls on the fuel distributors rather than on the Tribes." *Sac & Fox Nation of Missouri v. Pierce*, 213 F.3d 566, 578 (10th Cir. 2000).

(Respondent's Br. 24 n.6), Respondent's reliance on *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980), and *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), misses the mark widely.

These two cases considered the validity of a State's taxing amounts received from a tribe for, in *Central Machinery*, the sale of tractors pursuant to an agreement executed *on* reservation (448 U.S. at 161 n.1) and, in *Ramah Navajo*, a contract for the construction of an *on*-reservation tribal school (458 U.S. at 836). Respondent appears to argue that each of these cases had some off-reservation aspects. However, it is clear that the transactions the States in these respective cases sought to tax or regulate occurred *on* reservation. The situation here differs dramatically because the State tax is imposed and becomes due and owing off-reservation prior to actual delivery to the Respondent's station.

Finally, *amicus curiae* United States' claims that retailers bear the tax's legal incidence. (*Amicus Curiae* U.S. Br. 9-19). This issue was not raised below and has not been presented in Respondent's briefing. It therefore should not be considered. *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981). Nevertheless, even if entertained, the United States' proposed construction cannot be reconciled with the statute's language or lower court authority.

The Court should reject Respondent's contention that the legal incidence of the Kansas fuel tax is not on the first receipt of the fuel by the distributor, manufacturer or importer, and conclude that there is no authority supporting the application of *White Mountain Apache* balancing to strike off-reservation state taxation. Once this conclusion is reached, Respondent's remaining arguments crumble.

B. Respondent argues that the Kansas tax is discriminatory. (Respondent's Br. 17). This argument is based on Kansas providing an exemption for fuel delivered to points outside of Kansas. It is clear, however, that the export exemption is for fuel delivered outside of Kansas, and the court of appeals has determined that Indian reservations are in Kansas, not outside. "The Kansas

motor fuel tax law imposes a *non-discriminatory* tax on all wholesale fuel distributors for fuel distributions to retailers within the State of Kansas – Indian or otherwise." *Sac & Fox*, 213 F.3d at 582. (Emphasis added.)

A nondiscriminatory tax imposed on non-exempt private entities that do business with Indian tribes and pass the cost of those taxes on to the tribes does not violate tribal sovereign immunity. *Chickasaw Nation v. Oklahoma Tax Comm'n*, 31 F.3d 964, 970 (10th Cir. 1994), *aff'd in part, rev'd in part on other grounds*, 515 U.S. 450 (1995).

Respondent's additional contention that the Kansas fuel tax is "discriminatory" and accordingly outside the scope of *Mescalero Apache* is flawed for two fundamental reasons. The first is quite straightforward and wholly ignored by Respondent. Because the non-tribal distributor, not Respondent, is the entity regulated off-reservation, this Court need not even consider precisely what special "discrimination" standards, if any, apply under *Mescalero Apache*. Ordinary, Fourteenth Amendment-based equal protection principles govern and, given the absence of any basis for strict scrutiny, require only a rational-basis for not granting an exemption from the state tax for fuel delivered to tribal retailers such as that extended under § 79-3408(d)(2) and (3) to the United States or to its contractors with cost-plus-a-fixed-fee contracts. *E.g.*, *Heller v. Doe*, 509 U.S. 312, 325-26 (1993).

Even if *Mescalero Apache* applied directly, neither the analysis nor the result would differ. This Court held there that "[a]bsent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State." 411 U.S. at 148-49. On its face, such a standard merely sets forth the requirement otherwise implicit in the Equal Protection Clause that tribal members be accorded the same rights and privileges as other "citizens" – i.e., that they not be discriminated against because of their tribal status. The Kansas fuel statute embodies no such discrimination against tribal members or tribes themselves.

For example, there is no exemption from distributor tax liability granted to governmental sovereigns of any kind, and the suggestion that Respondent is treated differently from other sovereigns, except the United States, with respect to intrastate "sales or deliveries." (Respondent's Br. 18) misreads Kan. Stat. Ann. § 79-3408(d)(1) which exempts only sales or deliveries for export *out of state*. Whatever else might be said about Respondent's reservation, it lies within Kansas (*Cotton Petroleum*, 490 U.S. at 188), and Indian reservations are admittedly quite distinct from States and foreign countries under the federal constitution. *E.g., Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 13 (1831). There is no basis in this Court's jurisprudence for the notion that Kansas may not distinguish between tribes with reservations located in-state and other sovereigns for multiple purposes, including taxation, without running afoul of the "discrimination" prohibition in *Mescalero Apache*.

C. Respondent's and *Amicus* United States' reliance on *Kaul v. State Dept. of Revenue*, 266 Kan. 464, 970 P.2d 60 (Kan.1998), *cert. denied*, 528 U.S. 812 (1999), for the proposition that the legal incidence of the Kansas fuel tax is predicated on events that transpire subsequent to the receipt of fuel by the distributor, importer or manufacturer is also incorrect.

Kaul only addressed the narrow question of whether the plaintiff in that case (an Indian on Respondent's reservation selling gasoline at retail) had standing. The court acknowledged that the distributor is liable for the payment of the fuel tax, but that the distributor may collect the tax from the retailer as part of the selling price (merely representing a cost of doing business). *Kaul* 266 Kan. at 474. Since the distributor in *Kaul* itemized the cost of the tax on its billing, the plaintiffs were held to have standing because they felt the economic pinch of the cost of the tax. *Id*. However, standing and legal incidence

are two discrete concepts. Standing, when grounded in economic burden, gets you in the courtroom doors (which is all that *Kaul* addressed), but, once inside, the question remains as to where the legal incidence of the tax rests. The *Kaul* Court never addressed the question of "legal incidence" in the context of whether a state tax is pre-empted for federal Indian law purposes. Clearly, Respondent is mixing economic burden for standing purposes with legal incidence for preemption purposes. The two are different, and *Kaul* is simply in apposite.

II. Respondent's Defense Of The *White Mountain Apache* Balance-Of-Interests Test Is Unpersuasive

Respondent offers little justification for maintaining the *White Mountain Apache* balance-of-interests test in an area in which this Court has recognized a need for legal certainty. *Chickasaw Nation*, 515 U.S. at 460. The proffered justification – that the current balancing test has been applied without a problem (Respondent's Br. 48) – is simply not credible. Moreover, Respondent's reiteration of the myriad "unique" and "narrow" facts, and the laundry list of its economic circumstances simply beg the question as to whether balancing is viable.[3]

The difficulty in applying *White Mountain Apache* where state taxes are challenged, and the attendant lack of predictability, cannot be fairly denied given the conflict between the decision below and *Sac and Fox*, the case that

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[3] One simple example from the court of appeals decision points to the inherent flaw of balancing. The court of appeals found that Respondent's fuel price is within two cents of market. J. A. 134. But what if it was four cents, six cents, eight cents, a dime below market? Now does the balance tip in favor of the State? What if it is two cents below market this week, and a dime below market next week? Where and when does the balance tip? Do these same standards apply to the other three tribes in Kansas and their respective casinos and fuel stations? What about other tribal businesses? And how can a State effectively administer its tax policy with the legion of "unique" and "narrow" unknowns, some of which, like pricing, can shift from day-to-day?

Respondent relies upon for its perverse claim that, except in "unique" circumstances, "the Tenth Circuit has *preserved* the Kansas fuel tax, even as applied to fuel distributed to tribal retailers." (Opp'n 27). Below, the court of appeals relied upon the concept of "reservation value added" to invalidate the Kansas tax – a concept aimed at capturing the notion that most fuel purchasers at the tribal station were drawn to the reservation by the casino. The elastic nature of that notion hardly needs detailed elaboration.

Under the court of appeals' approach, states likely will be required either to adduce or rebut evidence related to, among other things, the nature of the product, how a tribe markets it, where the tribe markets it, what the selling price is, the demographic composition of a tribal establishment's clientele, and why those customers do business there. Suffice it to say, the permutations and the degree of significance of each are, literally, endless and unknowable for viable predictability of tax administration. Respondent is tellingly silent as to the necessary implications of the interest balancing they portray as predictable. All Respondent says is, in effect, "There is no need to abandon balancing."

Respondent also argues that *White Mountain Apache* balancing is a "synthesis of 200 years of Indian Law." (Respondent's Br. 47). That is plainly wrong. In fact, as properly noted by Justice (now Chief Justice) Rehnquist in *Colville*, the introduction of balancing was the anomaly.

> I am convinced that a well-defined body of principles is essential in order to end the need for case-by-case litigation which has plagued this area of the law for a number of years. That doctrine, I had thought, was at bottom a pre-emption analysis based on the principle that Indian immunities are dependent upon congressional intent at least absent discriminatory state action prohibited by the Indian Commerce Clause. I see no need for this Court to balance the state and tribal interests in enacting particular forms of

> taxation in order to determine their validity. Absent discrimination, the question is only one of congressional intent. Either Congress intended to pre-empt the state taxing authority or it did not. Balancing of interest is not the appropriate gauge for determining validity since it is that very balancing which we have reserved to Congress.

Colville at 176-77. As Chief Justice Rehnquist noted in *Colville*, balancing lends itself to protracted litigation as parties disagree over facts, which facts are to be balanced, how they are to be balanced, which facts are to be accorded weight, how much weight they are to be accorded, and so on. Thus, while balancing was thought to provide clear guidance and lines of demarcation, just the opposite has proven true. This case demonstrates why balancing needs to be replaced with preemption based on congressional intent.

To support adherence to balancing, Respondent contends that the State and local governments provide no services on tribally owned roads. (Respondent's Br. 13). Of course, Respondent does admit that Petitioner provides services on its reservation (*Id.* 19), but then asserts, albeit obliquely, that those services do not count because Petitioner, "already collects fuel taxes from the other two non-tribal stations." (*Id.* 19-20).

In fact, the State and local governments provide services (including significant fuel tax revenues) to about 45% of all roads on the reservation. (J. A. 79). Moreover, the district court below determined that the vast majority of governmental services used by the non-Indian purchasers are provided by the State, off the reservation, and the State also provides services on and near the reservation including maintenance of U.S. Highway 75, the highway runs through the reservation. In addition to road maintenance, the State provides fire and police protection on and near the reservation. (J. A. 115, 118).

Balancing, which was once a shield for tribes, has now been forged into a sword to hack away at off-reservation state authority. The *White Mountain Apache* balancing test, as applied by the court below, has now been extended

far beyond its originally intended purpose. This case illustrates the point that the balancing test has fostered a process of picking and choosing facts and creating novel theories and then altering them along the way that makes *ipse dixit* rationale possible. This case is emblematic of the need for this Court to abandon the balancing test, and instead adopt preemption based on congressional intent.

III. The Court Of Appeals' Erred In Its Application Of The Balancing Test

Respondent defends the court of appeals' application of the *White Mountain Apache* interest-balancing standards on several grounds that "the Nation Station's customers are generated by the casino and other on-reservation values" (Respondent's Br. 32), the tribe is not marketing an exemption (*Id.* 31) and that the State "provides no services at all on tribally owned reservation roads." (*Id.* 13, 44)

While Respondent's brief leaves the false impression that the State does nothing for roads and bridges on the reservation, the uncontroverted facts show precisely the opposite. State and local state governments have responsibility for nearly 100 miles of reservation roads. (J. A. 79) The 45% of reservation roads maintained by the State and local governments is in addition to the state built and maintained U.S. State Highway 75 running through Respondent's reservation. Funding for these state road services comes from the state fuel taxes at issue here. The absence of this integrated road system infrastructure provided by the State would make the existence of Respondent's casino and fuel station a practical impossibility.

There can be no legitimate dispute that Kansas provides substantial services which provides access to Respondent's casino and gas station. This is not, in other words, "a case in which the State has nothing to do with the [alleged] on-reservation activity, save tax it." *Cotton Petroleum*, 490 U.S. at 186.[4]

[4] Petitioner has identified substantial services and regulatory functions directly related to its exercise of off-reservation fuel taxation. This is in stark contrast to a state tax being preempted when a state

(Continued on following page)

Respondent also argues that the taxes at issue are not proportional to services provided by the State. (Respondent's Br. 42). However, proportionality has never been a sufficient basis for striking a state tax. "Neither *Bracker*, nor *Ramah Navajo School Bd.*, however, imposes such a proportionality requirement on the States." *Cotton Petroleum*, 490 U.S. at 185. "Not only would such a proportionality requirement create nightmarish administrative burdens, but it would also be antithetical to the traditional notion that taxation is not premised on a strict *quid pro quo* relationship between the taxpayer and the tax collector." *Id.* n.15.

Respondent also believes that the balance-of-interests favors the State only when a tribe is marketing an exemption. There is no support for this proposition. The fact that a tribe attempts to attract customers to its reservation through a tax differential constitutes only one factor that bears upon the preemption challenge's outcome. *See Colville*, 447 U.S. at 155. Moreover, by selling its fuel at market prices, Respondent is making both a profit and collecting a tax. While the state tax here might burden Respondent's profits, it can claim no right to unlimited sales volume or profit. *Id.* 151 n.27. A tax on non-Indians may be valid even if it seriously disadvantages or *eliminates* the Indian retailer's business with non-Indians. *Id.* (Emphasis added.) Accordingly, the court of appeals' preemption determination is reduced to the conclusion that Respondent provides added reservation value because the gas station sits next to Respondent's casino.

This Court in *Cotton Petroleum* has removed any doubt that the mere presence of "reservation value added" is insufficient to preempt a state tax whose legal incidence

was "unable to identify any regulatory function or service [it] performed . . . that would justify the assessment of taxes for activities on Bureau and tribal roads within the reservation," *White Mountain Apache*, 448 U.S. 148-49. See also *id.*, at 174 (Powell, J., concurring) ("The State has no interest in raising revenues from the use of Indian roads that cost it nothing and over which it exercises no control").

is borne by a nonmember. The presence of such value in *Cotton Petroleum* was undisputed since the state oil and gas taxes were assessed with respect to on-reservation production from tribal lands pursuant to a lease between the non-Indian producer and the tribe. 490 U.S. at 168-69. In sustaining the tax against a *White Mountain Apache*-based challenge, the Court reasoned that while "[i]t is . . . reasonable to infer that the New Mexico taxes have at least a marginal effect on the demand for on-reservation leases, the value to the Tribe of those leases, and the ability of the Tribe to increase its tax rate[,]" such impairment in itself was "simply too indirect and too insubstantial" to invalidate the state taxes. *Id.* at 186-87. What was equally dispositive was the fact that the State provided "'substantial services'" to the tribe and the mineral lessee (*id.* at 185).

Finally, Respondent, for the first time in this case, adds to the mix the Indian Reservation Roads Program (IRRP) 25 C.F.R. § 170 (which it claims demonstrates a comprehensive federal regulatory scheme sufficient to oust off-reservation state jurisdiction) together with IGRA, Presidential Proclamations, and the other generalized federal enactments cited by the court of appeals as demonstrative of federal interests against the Kansas tax. (Respondent's Br. 35-40).

The IRRP and related Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, 112 Stat. 107 (1998) do not constitute a comprehensive federal regulatory scheme akin to that at issue in *White Mountain Apache*. *See* 448 U.S. at 149. Here, there has been no showing that the Federal Government has undertaken to regulate the most minute details of motor fuel distribution, and nothing in the IRRP or TEA-21 suggests otherwise. Rather, these acts and regulations merely provide a source of funding for reservation roads, and make generalized statements about providing guidance, providing funding distribution methodology, encouraging cooperation between state highway agencies, federal agencies and tribes.

Nor is there is anything within the Act that creates and establishes a comprehensive federal regulatory scheme sufficient to oust off-reservation state taxation. Its scope is limited to on-reservation activity, and does not address off-reservation state authority. In fact the IRRP makes clear that it does not have significant federalism effects because it pertains solely to Federal-tribal relations and will not interfere with the roles, rights, and responsibilities of States. *See* § 170.101.

IV. The Kansas Fuel Tax Not Otherwise Preempted By Federal Law

Respondent raises several additional matters. While raised below, none were the basis for the court of appeals' decision.

1) Respondent posits that the Act for Admission of Kansas Into the Union prohibits the tax at issue in this case.[6] As the Tenth Circuit stated in *Sac and Fox*, "the Act for the Admission of Kansas into the Union . . . [does not] lend[] any support to the Tribes' challenge to the Kansas motor fuel tax law." 213 F.3d at 577.

Further, the meaning of this section of the Act is that establishing the metes and bounds of Kansas did not lessen the geographic dimensions of Indian reservations then

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[6] The operative language pointed to by Respondent is:

> That the state of Kansas shall be, and is hereby declared to be, one of the United States of America, and admitted into the union on an equal footing with the original states in all respects whatever. And the said state shall consist of all the territory included within the following boundaries . . . Provided, That nothing contained in the said constitution *respecting the boundary* of said state shall be construed to impair the rights of person or property *now pertaining* to the Indians of said territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians. . . ." (Emphasis supplied.)

Act for Admission of Kansas into the Union, Ch. XX, § 1, 12 Stat. 126 (1861).

existing. In other words, the *dimensions* of the State set forth in the Act would not be construed to permit a "land grab" and wrest reservation land from the Indians as set forth in the then existing treaties. *See U.S. v. Ward*, 1 Woolw. 17, 1 Kan. Dass. Ed. 601, 604-05 C.C.D. Kan. (1863).

Enabling Acts themselves require states to disclaim only their proprietary interest in Indian land, not their governmental or regulatory authority over that land. *Organized Village of Kake v. Egan*, 369 U.S. 60, 67-69 (1962); *Jicarilla Apache Tribe v. U.S.* 601 F.2d 1116, 1135 (10th Cir.), *cert. denied*, 444 U.S. 995 (1979); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 561-63 (1983).

2) Respondent, and in particular *Amicus* United States, argue that the Indian Trader Statutes, 25 U.S.C. §§ 261-264, prohibit application of the state tax at issue here. The Indian Trader Statutes, however, are of no assistance to Respondent.

Respondent relies heavily upon *Warren Trading Post v. Tax Comm'n*, 380 U.S. 685 (1965), and *Central Machinery*. Both cases, however, not only are distinguishable factually but also have been limited by this Court explicitly in *Department of Taxation & Finance v. Milhelm Attea & Bros., Inc.*, 512 U.S. 61, 71, 75 (1994), and implicitly in *Chickasaw Nation*.

First, both *Warren* and *Central Machinery* involved traders selling, in one instance, goods and, in the second, tractors to tribal members and a tribe for *their* consumption or use. Here, the vast majority of fuel sold to Respondent is being *re-sold* to consumers, virtually all of whom are non-tribal members, and most of such fuel is consumed off reservation. This controversy accordingly does not present an instance where the "assessment and collection of th[e] tax 'would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations'" since the fuel tax, to the extent passed on by the distributor to the tribal retailer, will be passed through to the ultimate consumer. *Moe*, 425 U.S. at 482 (quoting *Warren*, 380 U.S. at 691). The underlying

rationale for the Indian Traders Statutes – protecting tribes from commercial overreaching – has no relevance under these circumstances. *See Central Machinery*, 448 U.S. at 163. The tax further differs from the exactions struck down in *Warren* and *Central Machinery* because it is not triggered by fuel sales to Respondent; rather, the distributor's tax obligation arises, as discussed in Part I.A, upon its receipt of fuel.

Second, reliance on the Indian Trader Statutes cannot be squared with *Milhelm Attea* and *Chickasaw Nation*. This Court clarified in the first of those decisions that, notwithstanding "broad language" in *Warren*, "Indian traders are not wholly immune from state regulation that is reasonably necessary to the assessment and collection of lawful state taxes." *Milhelm Attea*, 512 U.S. at 75. Although *Milhelm Attea* did not address directly the question of imposing a tax on an Indian trader with respect to an on-reservation transaction, its reference to "lawful taxes" presumably referenced this Court's more general Indian-law taxation jurisprudence, including that in *White Mountain Apache* and *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973).

The import of *Milhelm Attea* is reflected in *Chickasaw Nation*. There, this Court, in the specific context of motor fuel taxation, emphasized the importance of identifying the economic actor on whom a tax's legal incidence falls and drew a distinction between "attempts to compel Indians to collect and remit taxes actually imposed on non-Indians" as opposed to "attempts to levy a tax directly on an Indian tribe or its members inside Indian country, rather than on non-Indians." 515 U.S. at 458. It then cited *Colville* and *Milhelm Attea*, for the proposition that "if the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax" and that "if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy." *Id.* at 459.

Immediately following the citation to *Milhelm Attea*, this Court held that "the inquiry proper here is whether

the legal incidence of Oklahoma's fuels tax rests on the Tribe (as retailer) or on some *other* transactors – here, the *wholesalers* who sell to the Tribe *or* the *consumers* who buy from the Tribe." *Id.* (emphasis added). The Court concluded its analysis with the observation that "[j]udicial focus on legal incidence in lieu of a more venturesome approach accords due deference to the lead role of Congress in evaluating state taxation as it bears on Indian tribes and tribal members." *Id.*

Synthesis of the reasoning in *Milhelm Attea* and *Chickasaw Nation* results in a straightforward rule: States may impose the legal incidence of a fuel tax on either the distributor or the consumer even though a tribe or a member is the retailer to the extent the tax is otherwise permissible under ordinary Indian law tax principles. The Indian Trader Statutes may play a role in application of those principles if the dispute's circumstances implicate its animating purposes, but here they do not for the reasons described above.[6]

3) Respondent and *Amici* NCAI argues that the Indian Commerce Clause prohibits the state tax at issue here. In fact, the Indian Commerce Clause offers nothing other than justification for federal legislation affecting Indians. *E.g., Cotton Petroleum* 490 U.S. at 192 ("the central function of the Indian Commerce Clause is to

[6] The burden of the Kansas tax is obviously less than those imposed on tribal retailers in *Colville* and *Moe*, because here Respondent has no reporting or remittance responsibilities. Indeed, the absence of any regulatory responsibilities under the Kansas statute separates this controversy from *Milhelm Attea*, where the New York law required retailers to tender "Tax Exemption Coupons" to their wholesalers upon delivery of cigarette shipments and to require proof from customers at the time of first purchase that they were "qualified Indian consumers." *Id.* at 66-67. Crediting Respondent and the United States' approach thus would fulfill the prophecy in *Milhelm Attea* that barring "any and all state-imposed burdens on Indian traders . . . might well have the perverse consequence of casting greater state tax enforcement burdens on the very reservation Indians whom the Indian Trader Statutes were enacted to protect." *Id.* at 74.

provide Congress with plenary power to legislate in the field of Indian affairs. . . ."). Further, the Indian Commerce Clause possesses no dormant component.

Imposition of a state's fuel tax off-reservation does not violate the Indian Commerce Clause any more than it violates the Interstate Commerce Clause. Judicial review of state taxation is "intended to ensure that States do not disrupt or burden interstate commerce when Congress' power remains unexercised: it protects the free flow of commerce, and thereby safeguards Congress' latent power from encroachment by the several States." *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 154 (1982).

Moreover, the State is not automatically barred from applying non-discriminatory tax laws even though they may significantly touch the political and economic interests of the tribes. *Colville*, 447 U.S. 134 at 157 (discussing Indian Commerce Clause). Only *undue* discrimination is forbidden. *Id.*

The burden placed on Respondent's fuel supplier here is not applied in a discriminatory manner; it is applied to all importers, manufacturers and distributors of fuel into Kansas, and it is applied off-reservation.

4) Respondent also complains about the unfairness of double taxation.[7] This, however, does not constitute a recognized legal argument. The federal government taxes

[7] Respondent discusses a 1992 "agreement" between Kansas and Respondent, allegedly to address taxation by the State and Respondent of the same transaction. (Respondent's Br. 7, 26); *see also Amicus Curiae* Nat'l Intertribal Tax Alliance Br. 9-10. Former Kansas Governor Joan Finney did sign an agreement with Respondent (she also signed similar agreements with all resident tribes in Kansas). Respondent fails to mention, however, that under Kansas law, in order to be in full force and effect such agreements had to be ratified by the Kansas Legislature. The agreement was never validated by the Kansas Legislature. *State ex rel. Stephan v. Finney*, 251 Kan. 559, 836 P.2d 1169 (1992). The agreement, even had it been ratified, would have expired in 1996 and is no longer of any use other than as a historical curiosity, and should not, in any fashion, have a bearing on the outcome of this case. *See Sac and Fox Nation of Missouri v. Lafaver*, 31 F. Supp.2d 1298, 1302-03 (D. Kan. 1998).

fuel, tires, alcohol, cigarettes, and so do states, and the consumer pays for all of it. Except for consumers, no one "pays" taxes. The costs of taxes are built into selling prices, which is how the costs of taxes are disbursed. The fact that the federal government, the State and Respondent may all tax the same transaction does not invalidate the state's tax. *Colville*, 447 U.S. 134, 158 (1980) (state tax not invalid where state and tribal taxes imposed on same transaction), and *Cotton Petroleum,* 490 U.S. 163 (1989) (state tax not invalidated simply because tribe taxes the same commodity).

In essence, Respondent claims that imposition of the state tax causes it to be harmed economically. However, this has never been the standard. In *Henneford v. Silas Mason Co.*, 300 U.S. 577, 581 (1937), this Court upheld a state tax on one of its resident's use of goods purchased in another State without regard to the fact that the other State's competitive ability to tax the same transaction was obviously reduced. The Court observed that such a tax was permissible even if no credit for the other state tax were allowed. *Id. See also Colville* at 151.

Respondent also argues that the State tax infringes on its governmental interests. However, there is no direct conflict between the State and tribal schemes, since each is free to impose its taxes without ousting the other. Although taxes may be imposed for non-revenue governmental purposes, Respondent has failed to show non-revenue purposes for its tax, and there is no intent on the part of Congress to preempt the state tax here. While some tribal ordinances may regulate the marketing of gasoline by the tribal enterprise, the State does not interfere with Respondent's power when it simply imposes its tax on receipts by distributors, importers or manufacturers off-reservation. *See Colville* at 158-59.

CONCLUSION

For the foregoing reasons, and for those stated in the Petitioner's Brief and Petition, Kansas respectfully requests that the Court reverse the court of appeals.

Respectfully submitted,

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